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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Application of	)	
	)	CC Docket No. 94-136
ELLIS THOMPSON CORPORATION	)	
	)	File No. 14261-CL-P-134-A-86
For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 134, Atlantic City, New Jersey	)	
To: The Review Board		

OPPOSITION TO APPEAL

Ellis Thompson Corporation ("ETC"), by its attorneys, pursuant to Section 1.301(c)(7) of the FCC Rules, herein opposes Ameritel's March 27, 1995 Appeal of ALJ Chachkin's March 7, 1995 Memorandum Opinion and Order which denied its Petition To Intervene (the "Petition") in the captioned case.[1]

Ameritel's February 6, 1995 Petition claimed that it was entitled to intervention as a matter of right pursuant to Section 1.223(a) of the FCC Rules because it was the successor-in-interest to Ameritel, Inc. whose application was selected fifth in the lottery for the nonwireline cellular system authorization in the Atlantic City, New Jersey MSA. Ameritel also requested discretionary intervention pursuant to Section 1.223(b) of the FCC Rules.[2] In

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[1]FCC 95M-68 (ALJ Chachkin, March 7, 1995) ("MO&O").

[2]The Petition was opposed by every party to this proceeding. See "Comments On Petition To Intervene" filed jointly by The Wireless Telecommunications Bureau and Telephone and Data Systems, Inc. on February 15, 1995; Opposition To Petition For Leave To Intervene" file by American Cellular Network on February 15, 1995; and "Opposition To Petition To Intervene" filed by ETC on February 22, 1995.

the March 7, 1995, MO&O, the ALJ denied the Petition.[3]

Ameritel Failed to Show In Its Petition That It Is The Successor-In-Interest to Ameritel, Inc.

Under the FCC's Rules, Ameritel had the burden of establishing that it was entitled to intervention as a matter of right as a "party in interest," by filing "a petition for intervention showing the basis of its interest."[4] Ameritel made no such showing in its Petition. Ameritel's entire effort to establish its right to intervene was a single conclusory sentence contained in a footnote, that it is the successor-in-interest to Ameritel, Inc.[5] A mere conclusory statement to that effect is not a "showing" and Ameritel's efforts to characterize it as such should be flatly rejected.[6] The generic Declaration of Richard Rowley merely

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[3]On March 21, 1995, four weeks after the last opposition was filed and two weeks after the Petition was denied, Ameritel filed a Motion for Leave to File Response ("Motion") and a Response, attempting to reply to the various oppositions. In a March 24, 1995 Order, the ALJ denied the Motion. FCC 95M-84 (ALJ Chachkin, March 24, 1995). ETC does not take issue with Ameritel's claim that it failed to receive timely notice that the ALJ had issued the MO&O denying the Petition and that, therefore, the untimeliness of its appeal is excusable. However, the fact that Ameritel was unaware that the ALJ had denied its Petition affords Ameritel no excuse for having waited four weeks after the filing of the last of the oppositions to seek the ALJ's leave to respond to them. Indeed, in neither its Motion nor its Appeal does Ameritel supply a justification for such a lengthy delay. Although the ALJ could have ruled on the Petition at any time after the oppositions were filed, he did not do so until two weeks after the last opposition was filed. See 47 C.F.R. §§ 1.294 and 1.298(a). By waiting four weeks after the last of the oppositions was filed, Ameritel fully assumed the risk that the ALJ would rule on the Petition in the meantime. Since the ALJ did so, both of Ameritel's pleadings were moot ab initio and the ALJ correctly denied its Motion.

[4]47 C.F.R. §1.223(a) (emphasis supplied). The plain language of Section 1.223(a) and the absence of a reply in the authorized pleading cycle makes clear that this "showing" must be contained in the petition for intervention. 47 C.F.R. §1.223(a), 1.294(a).

[5]Petition at n.7.

[6]Appeal at ¶4.

certifies the conclusion; it does not convert the conclusion into a showing.[7] The ALJ correctly concluded that Ameritel failed to establish its basis for intervention as a matter of right in its Petition.

Ameritel Is Otherwise Not Entitled To Intervention As A Matter of Right

Ameritel's citations to Algreg Cellular Engineering[8] are irrelevant to the question of whether it adequately demonstrated that it is the successor-in-interest to Ameritel, Inc. in its Petition.[9] There was no "successor-in-interest" issue in Algreg Cellular Engineering. Nonetheless, even if Ameritel were to have initially established that it is in fact the successor-in-interest to Ameritel, Algreg Cellular Engineering is unavailing. That case involved mutually exclusive applicants, each of which would have an equal opportunity in any subsequent re-lottery of the subject authorization because the FCC would look to the entire original lottery pool. In the instant case, Ameritel's claim does not arise from its mutually exclusive status so much as it does from the fact that it was the fifth-selected applicant in the Atlantic City lottery.[10] Indeed, Ameritel's interest is too attenuated to

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[7]Although it is not the purpose of this pleading to address the merits of Ameritel's Response, ETC notes that even given the long time Ameritel took to construct its story, Ameritel's failure to provide its date of formation as an Ohio general partnership and a copy of the partnership agreement still leaves a decisionally critical gap in the Ameritel, Inc. ownership chain between the liquidation of Metrotec, Inc. in 1988 and the formation of Ameritel. See Appeal at Exhibit 1 (Affidavit of Thomas E. Rawling).

[8]CC Docket No. 91-142, 6 FCC Rcd 5299, 5300 (Rev. Bd. 1991).

[9]See Appeal at n.3 and ¶4.

[10]The Commission did not intend to confer standing by requiring the ranking of applicants in a cellular lottery context. The Commission clearly stated that "[t]he rationale for this requirement is that if the first ranked applicant is found to be unqualified there will be alternative selectees available and thus, there will be no need to conduct additional lotteries." Cellular and Public Land Mobile Lottery Selection, Order, 4 FCC Rcd 7294

(continued...)

justify intervention as a matter of right. As the FCC recognized in later eliminating the ranking of applicants, "Our experience in conducting several hundred Cellular Radio and Public Land Mobile lotteries has been that only in very few cases has it been necessary to go to the second ranked applicant."[11] In this case, each of four applicants ranked ahead of Ameritel would, in turn, have to be designated for hearing and then disqualified. Only under such unprecedented circumstances would Ameritel stand to gain.

Ameritel Was Properly Denied Section 1.223(b) Intervention

Ameritel also failed to demonstrate how its intervention would assist the FCC in the determination of the single designated issue pursuant to Section 1.223(b) of the FCC's Rules. The FCC has indicated that such a showing must "raise substantial issues of law or fact which have not or would not otherwise be properly raised or argued; and that the issues be of sufficient import and immediacy to justify granting the intervenor the status of a party."[12] Ameritel has failed to make the required showing.

This proceeding has its genesis in a lottery held on April 23, 1986. In the often serpentine and consistently challenged path that the ETC application has traveled in the nine years since then, not once did Ameritel, in any of its alleged incarnations, participate. As such, Ameritel is uniquely unfamiliar with the issues and its participation could serve no useful purpose. There is nothing in Ameritel's Petition to demonstrate that, despite its failure to participate, it has particular or unique knowledge such that its assistance as a party

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[10](...continued)
(1988). Administrative expediency should not be confused with a basis for intervention as a matter of right.

[11]Ibid.

[12]Victor Muscat, 31 FCC 2d 620, 621 (1971).

is needed to resolve the single designated issue.[13] Thus, Ameritel's request for a Section 1.223(b) intervention should be denied.

ETC submits that a grant of Ameritel's Appeal will result in waste of the ALJ's time and the FCC's resources and additional delay in resolving the single designated issue.[14] Ameritel had a full opportunity to establish its claim to intervenor status in its Petition. It did not do so and the ALJ correctly denied the Petition.

Respectfully submitted,

ELLIS THOMPSON CORPORATION

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April 6, 1995

[13]GAF Broadcasting Company, Inc., MM Docket No. 93-54, FCC 93M-360 at ¶4 (ALJ Chachkin, June 15, 1993).

[14]The Commission's view is that "[i]n order to preserve administrative orderliness and to provide administrative finality, Commission policy disfavors intervention." Teleconnect Company v. The Bell Telephone Company of Pennsylvania, et. al, 6 FCC Rcd 5202, 5206 (1991).

CERTIFICATE OF SERVICE

I, Sheila L. Borghi, a secretary in the law firm of Fleischman and Walsh, L.L.P., do hereby certify that I have on this 6th day of April, 1995, had copies of the foregoing "Opposition To Appeal" mailed by U.S. first class mail, postage prepaid, to the following:

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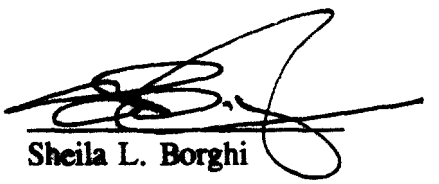

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